2016

Banner Bank, a Washington Corporation, Formerly Doing Business in Utah as Americanwest Bank and Far West Bank, Judgment Creditor and Appellee, vs. Mikel. Robertson, an Individual, Judgment Debtor and Appellant.

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

BANNER BANK, a Washington corporation, formerly doing business in Utah as AMERICANWEST BANK and FAR WEST BANK, Judgment Creditor and Appellee, vs. MIKE L. ROBERTSON, an individual, Judgment Debtor and Appellant.	Case No. 20150513

BRIEF OF APPELLEE

Mike L. Robertson
544 N. 880 E.
Springville, UT 84663
Phone: 801-592-7674
Email: megus@usa.com

Appellant Pro Se

Steven W. Call (5260)
Jonathan A. Dibble (0881)
Ray Quinney & Nebeker P.C.
36 S. State St. Suite 1400
PO Box 45385
Salt Lake city, UT 84145-0385
Phone: 8001-532-1500
Email: scall@rqn.com
Email: jdibble@rqn.com

Attorneys for Appellee

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36 S. State St. Suite 1400
PO Box 45385
Salt Lake city, UT 84145-0385
Phone: 8001-532-1500
Email: scall@rqn.com
Email: jdibble@rqn.com

Attorneys for Appellee

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STATEMENT OF PARTIES

AmericanWest Bank acquired Far West Bank which formerly did business in Utah for many years. AmericanWest Bank was conducting business in Utah as AmericanWest Bank until approximately November 2, 2015 when it merged with Banner Bank. To avoid confusion Appellee will refer to Banner Bank, AmericanWest Bank and Far West Bank as "Banner Bank" or "the Bank". Michael L. Robertson ("Robertson") is a pro se defendant.

JURISDICTIONAL STATEMENT

The Bank does not dispute that this Court has appellate jurisdiction pursuant to Utah Code Ann. § 78A-4-103 to review the deficiency judgment signed and entered and by the Fourth District Court, State of Utah, against Defendant Robertson pursuant to *Utah Code Ann.* § 57-1-32, Judge David Mortensen presiding.

STANDARDS OF REVIEW

The Bank supplements the Standards of Review cited by Appellant Mike L. Robertson ("Robertson") as follows:

1. When a written contract is unambiguous, the Court should look no further than the plain meaning of the contractual language. See *Cent. Florida Inv., Inc. v. Parkwest Assoc.*, 2002 UT 3, ¶12, 40 P.3d 599. (The "Parol Evidence Standard").

2. This Court reviews the district court's "legal conclusions for correctness, granting [them] no particular deference." *ProMax Dev. Corp. v. Mattson*, 943 P.2d 247, 255 (Utah App 1997). (The "Correctness Standard").

3. Where there are mixed questions of law and fact and this Court is reviewing the district court's decision as to whether the facts come within the reach of the applicable law, this Court "review[s] legal questions for correctness [but] . . . may grant a trial court discretion in the application of the law to a given fact situation". *Covey v. Covey*, 2003 UT App 380, ¶ 17, 486 Utah Adv. Rep. 11 (quoting *Jeff v. Stubbs*, 970 P.2d 1234, 1244 (Utah 1998)); *see also Jensen v. IHC Hospitals, Inc.*, 2003 UT 51, ¶ 57, 486 Utah Adv. Rep. 60 ("If a case involves a mixed question of fact and law, we afford some measure of discretion to the [trial] court's application of law to facts.") (quoting *State v. Hansen*, 2002 UT 125, ¶ 26, 63 P.3d 650) (The "Application of Law to Facts Standard").

4. Factual findings are subject to the clear error standard. Because a trial court is in a better position to judge credibility and resolve evidentiary conflicts, an appellate court reviews the trial court's findings of fact for clear error. *Westmont Residential LLC v. Buttars*, 2014 UT App 291, ¶ 9, 340 P.3d 183 (quoting *State v. Levin*, 2006 UT 50, ¶ 20, 144 P.3d 1096 ("'Because a trial court is in a better position to judg[e] credibility and resolv[e] evidentiary conflicts, an appellate court reviews the trial court's findings of fact for clear error'"), *State v. Finlayson*, 2014 UT App 282, ¶ 18 (quoting *Salt Lake City v. Maloch*, 2013 UT App 249, ¶ 2 ("'when reviewing a bench trial for sufficiency of the evidence, we must sustain the trial court's judgment unless it is against the clear weight of the evidence, or if we [the appellate court] otherwise reach a definite and firm conviction that a mistake has been made.'"), *State v. Davie*, 2011 UT App 300, ¶ 18, 264 P.3d 770 ("Upon review, we accord deference to the trial court's ability and opportunity to evaluate credibility and demeanor."), *id.*, ("Because the trial court had the

opportunity to view these witnesses and weigh their credibility, we defer to its findings unless the record demonstrates clear error.") (alteration in original) (citation and internal quotation marks omitted). *Deseret First Federal Credit Union v. Parkin*, 2014 UT App 207, ¶ 15 ("We review the court's factual findings for clear error".) (The "Clear Error or Clearly Erroneous Standard").

5. The admission of evidence is reviewed under an abuse of discretion standard. *Avalos v. TL Custom, LLC*, 2014 UT App 156, ¶ 19, 330 P.3d 727. The Utah Supreme Court has stated that because a trial court has broad discretion to admit or exclude evidence, a Utah appellate court "will disturb its [the trial court's] ruling only for an abuse of discretion.'" *Id.*, (quoting *Daines v. Vincent*, 2008 UT 51, ¶ 21, 190 P.3d 1209). "Even when evidence is improperly admitted, reversal is required only where the admission of the evidence amounted to prejudicial error." *Id.* (citing *Larsen v. Johnson*, 958 P.2d 953, 958 (Utah Ct. App. 1998). (The "Abuse of Discretion Standard").

6. On appeal, "[t]he burden is on the appellant to not only show that there was an error, but that it was prejudicial to the extent that there is reasonable likelihood that in its absence there would have been a different result." *Joseph v. W. H. Groves Latter Day Saints Hosp.*, 10 Utah 2d 94, 348 P.2d 935 (1960); *see also Ortega v. Thomas*, 14 Utah 2d 296, 383 P.2d 406 (1963); *see also Ewell & Son, Inc. v. Salt Lake City Corp.* 27 Utah 2d 188; 493 P.2d 1283 (1972); *see also Redevelopment Agency v. Mistui Inv. Inc.*, 522 P.2d 1370 (Utah 1974) ("The burden is upon the appellant to show not only that there was error, but that it was substantial and prejudicial . . . .") (The "Harmless Error Standard").

STATEMENT OF THE CASE

A. Nature of the Case.

This appeal arises from a deficiency action brought after the non-judicial foreclosure of real property situated on the eastern hillside near Springville City, Utah. Robertson borrowed money from the Bank and executed the loan documents, including promissory notes, trust deeds and a business loan agreement (the "Loan"). Robertson failed to repay the Loan. Round Peak Natural Seed Farms, Ltd, a limited or general partnership, executed two trust deeds at separate times on four adjacent parcels of real property to secure two separate promissory notes made in 2006 and 2007. The two promissory notes were consolidated into a single promissory note for $669,726.32. Robertson defaulted on the Loan by failing to pay the 2009 promissory note. Proper notice of default was given under the two trust deeds. After Robertson failed to cure the defaults with the time provided for by law, the trust properties were noticed for sale. After notices of sale were properly posted, served and published, the trust deeds were foreclosed. The trust properties were sold at the two foreclosure sales. A deficiency action was timely commenced against Robertson. The district court granted partial summary judgment as to the loan balance prior to the foreclosure and ruled that the foreclosures were properly conducted. The district court conducted a trial and determined the fair market value of the trust properties at the time of the foreclosure sales. The fair market value of the trust property at the time of the foreclosure sales was less than the loan balance and the court entered a deficiency judgment against Robertson for the balance.

When the Bank commenced the deficiency action against Robertson, Robertson filed a counterclaim against the Bank. The counterclaim related to a separate ACH Agreement that was not part of the 2009 Note or the foreclosed trust deeds. The counterclaim alleged four claims for relief including (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) negligence and (4) unjust enrichment. Robertson's counterclaim was based on the allegation that the Bank acted improperly when it terminated the ACH Agreement. However, the Bank terminated the ACH Agreement according to its terms which provided that Robertson or the Bank could terminate the ACH Agreement by giving 10 days written notice. The Bank gave Robertson 20 days written notice. The district court granted summary judgment dismissing Robert's four counterclaims. The court determined that the ACH Agreement was properly terminated according to its terms, that there was no implied covenant of good faith and fair dealing that contradicted the mutual right of termination, that the negligence claim was barred by the economic loss doctrine and that there was no claim for unjust enrichment because there were written loan documents and agreement addressing the issues.

B. Course of the Proceedings.

After the non-judicial foreclosure sales of the two trust deeds were completed the Bank commenced a deficiency action against Robertson pursuant to 57-1-32 under each of the trust deeds to recover the deficiency balance. In response, Robertson filed an answer and counterclaim. In his counterclaim Robertson alleged four claims for relief including: (1) breach of contract, breach of the implied covenant and fair dealing,

negligence and unjust enrichment. The Bank moved for partial summary judgment on the Bank's claims for relief and full summary judgment on Robertson's counterclaim. After notice and hearing the district court granted partial summary judgment on Banner's claims for relief and summary judgment against Robertson's counterclaim. The district court also granted partial summary judgment on the Bank's deficiency claim on the 2009 promissory note. The district court's summary judgment against Robertson's counterclaim and partial summary judgment in favor of the Bank is attached as the Bank's Addendum, Tab A. Thereafter, the district court conducted a bench trial to determine the fair market value of the trust properties at the time of the foreclosure sales. At trial court received oral testimony from the Bank's employee, the Bank's expert witness and Robertson. The court also received an appraisal report and other documentary evidence. The court refused to consider testimony from an appraiser who Robertson had failed to disclose prior to the trial in compliance with the court's final pretrial order, and which he further failed to disclose at the commencement of the trial or prior to the time the court had dismissed the Bank's expert witness. After the conclusion of the trial the Court signed and entered its findings of fact, conclusions of law and judgment against Robertson (the "Judgment"). A copy of the Judgment is attached hereto as Addendum, Tab B. Robertson filed a motion for a new trial. The district court signed an order denying the motion on May 27, 2015. After the trial, and prior to its order denying a new trial, Robertson filed a chapter 7 bankruptcy case. After hearing, the bankruptcy court indicated that any right to appeal the district court's Judgment was abandoned by the bankruptcy trustee to Robertson.

C. Disposition in the Trial Court.

1. Disposition of The Bank's Motion for Partial Summary Judgment on its Deficiency Claims.

On April 25, 2013, the district court entered partial summary judgment in favor of the Bank. (R.000689-000684).[1] The court determined that the balance owing on the 2009 promissory note was undisputed and that the foreclosures sales were property conducted. (R.000688-000685). The court ruled:

> [3.] Far West's Motion for Partial Summary Judgment against Defendant Robertson is granted all on issues and claims with the exception that the Court will conduct a brief evidentiary hearing to determine the balance owing to Far West by Defendant Robertson under the 2009 Note and the fair market value of the trust properties at the time of the foreclosure sales; (R.000685)

2. Disposition of The Bank's Motion for Summary Judgment against Robertson's Counterclaim.

Based upon the uncontroverted facts and undisputed documents, the district court concluded the counterclaim filed by Robertson should be dismissed. The court concluded in part as follows:

> 8. The counterclaim in negligence against Far West should be dismissed because it is barred by the economic loss doctrine as that doctrine has been applied by the Utah courts. In addition, Robertson stipulated at hearing that the negligence claim against Far West could be dismissed with prejudice.
>
> 9. Defendant Robertson does not have a claim for breach of contract arising from the foreclosure of the Trust Deeds, the cancellation of the ACH Agreement or any other loan document or Agreement. The ACH Agreement unequivocally provided that either party could cancel the agreement within ten (10) days' notice. The facts are undisputed that Far West gave more than twenty (20) days' notice of cancellation of the ACH Agreement to Defendant Robertson and therefore Far West fully complied with the termination terms of the ACH Agreement.

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[1] The index of the record does not does not accurately reflect the title of this document.

10. Because the Far West Trust Deeds were foreclosed in compliance with their terms and applicable Utah law and because Far West terminated the ACH Agreement pursuant to its terms, Far West did not breach any implied covenant of good faith and fair dealing in connection with any of the foregoing documents or agreements.

11. The Court also rejects Defendant Robertson's argument that the implied covenant of good faith and fair dealing may be treated as tort-type claim or that an implied covenant of good faith and fair dealing may contradict specific written terms of an agreement.

12. Utah law bars a claim for unjust enrichment when there are written agreements governing the subject matter upon which the unjust enrichment claim is based. The facts are undisputed that there were written loan agreements made between Far West and Defendant Robertson concerning the subject matter of Defendant Robertson's unjust enrichment claim. Therefore, Defendant Robertson's claim for unjust enrichment should be dismissed with prejudice. (R.000687-000686)(Tab A)

3. Disposition of the Trial on The Bank's Deficiency Claims.

The district court conducted a trial on July 2, 2013. The court received oral testimony from the Bank's employee, the Bank's appraiser and Robertson. The court also received an appraisal report and other documentary evidence. At trial the court refused to allow Robertson to call an undisclosed witness. Neither the appraiser or her opinions had been disclosed in compliance with Utah R. Civ. P. 26, the court's final pretrial order, at the commencement of trial or prior to the release of the Bank's witness. After considering the evidence at trial the court determined the fair market value of the trust properties at the time of the foreclosure sales and the deficiency owing under the 2009 promissory note. The district court signed and entered a Judgment Against Mike L. Robertson (the "Judgment") on September 11, 2013 (R.001101-001096). The Judgment is attached hereto as Addendum Tab 2. The district court concluded, in part:

27. Based upon the testimony presented at trial and the documents received into evidence, the Court concludes by a preponderance of evidence that the total indebtedness owing by Defendant Robertson at the time the trust property was foreclosed on June 1, 2011 was $693,513.97.

. . . .

29. Based upon the testimony given at trial and the documents received into evidence, the Court concludes that the fair market value of the property in the amount of $340,000 at the time of the foreclosure sales was less than the $403,000 amount credit-bid by AmericanWest for the purchase of the Trust Property. Therefore the indebtedness was reduced by an amount greater than the fair market value of the Property.

30. Based upon the foregoing, the deficiency balance owing to AmericanWest as of July 1, 2013 was $416,216.80. (R.001095)

The district court also entered judgment for reasonable attorneys' fees and costs in favor of the Bank based upon the loan documents and *Utah Code Ann.* § 57-1-32.

D. Statement of Facts.

1. On August 21, 2006, Robertson executed a promissory note ("2006 Note") in the amount of $230,000 in favor of Far West (i.e., Banner) in exchange for a loan of $230,000.00. (R.001100) A copy of the 2006 Note is attached to The Bank's complaint. (R.000070-000069). Admitted in ¶¶ 6 and 7 of Robertson Answer ("Answer") (R.000106).

2. On August 21, 2006, Round Peak Natural Seed Farms, Ltd. as Trustor, by and through its general partner, Robertson, executed a Revolving Credit Deed of Trust ("2006 Trust Deed") in favor of the Bank, as trustee and beneficiary to secure the 2006 Note which matured September 1, 2007. (R.001100) A copy of the 2006 Trust Deed is Exhibit B to the complaint. (R.000067-000059); Answer, ¶¶ 9, 10 (R.000106).

3. The 2006 Trust Deed granted to Trustee, the power to sell the real property described therein on Exhibit A as 67.4 acres of hillside land at approximately 500 North 1100 East, Springville, Utah. (R.001100)

4. The 2006 Trust Deed was recorded August 22, 2006, as Entry 109306:2006 in the Utah County Recorder's Office. (R.001100)

5. On October 6, 2006 Round Peak Natural Seed Farms, Ltd. by and through its general partner Mike Robertson, executed a Modification of Deed of Trust ("Modification") increasing the Trust Deed from $230,000.00 to $500,000.00. (R.001100) The Modification is Exhibit C to the Complaint. (R.000058-000054) The Modification was recorded October 10, 2006, Entry No. 134222:2006 in the Utah County Recorder's Office. (R.001100)

6. On September 12, 2007, Robertson executed a promissory note ("2007 Note") in the amount of $250,000.00 in favor of Far West (i.e., Banner) in exchange for a loan in the sum of $250,000.00. (R.001100-001099) A copy of the 2007 Note is Exhibit D to the Complaint. (R.000054-000051); Answer, ¶¶ 17, 18 (R.000105).

7. On September 12, 2007 Robertson, as general partner of Round Peak Natural Seed Farms, Ltd., as Trustor, executed a Revolving Credit Deed of Trust ("2007 Trust Deed") in favor of the Bank as trustee and beneficiary to secure the payment of a revolving line of credit. (R.001099) A copy of the 2007 Trust Deed is Exhibit E to the Complaint. (R.000050-000041). Answer ¶¶ 18, 19 (R.000105).

8. The 2007 Trust Deed granted to the Trustee the power to sell the Trust Property described therein. (R.001099) It was recorded September 13, 2007, as entry No. 134636:2007 in the Utah County Recorder's Office. (Id.)

9. On April 23, 2009, Robertson executed a promissory note ("2009 Note") in the amount of $669,726.32 in favor of the Bank in exchange for the Bank lending to

Robertson the sum of $669,726.32. (R.001099) A copy of the 2009 Note is Exhibit F to the Complaint. (R.000040-000037); Answer, ¶¶ 22, 23 (R.000105).

10. On April 23, 2009, Robertson entered into Business Loan Agreement with Far West in the principal amount of $669,726.32 (the "Loan Agreement"). (See R.001099)

11. The obligations owing under the 2009 Note and Loan Agreement were secured by the 2006 Trust Deed as modified and the 2007 Trust Deed (collectively the Trust Deeds). (R.000067-000041) (The 2009 Note, the 2009 Loan Agreement, the 2006 Trust Deed and the 2007 Trust Deed are referred collectively as the "Loan Documents".)

12. Certain events of default occurred under the Loan Documents in that Robertson failed to timely make payments as required under the 2009 Promissory Note, the 2006 Trust Deed, as modified, and the 2007 Trust Deed. (R.001099)

13. Notices of Default were recorded on January 13, 2011, as Entry 4120:2011 and as Entry 4122:2011 with the Utah County Recorder's Office and served upon Robertson as Borrower and Round Peak Natural Seed Farms Ltd. as Trustor under the two Trust Deeds. (R.001099) Copies of the Notices of Default are Exhibits J and K to the Complaint. (R.000023-000018)

14. Robertson failed to cure the defaults that arose under the 2009 Note which was secured by the 2006 Trust Deed as modified, and the 2007 Trust Deed. (R.001099)

15. As a result, the trust properties securing the 2009 Note were formally noticed for sale. (R.001099-001098) Copies of the two Notices of Trustee's Sale are attached to the Complaint as Exhibits L and M. (R.000016-000009)

16. The Notices of Trustee's Sale were served on Robertson and Round Peak Natural Seed Farms, Ltd and published and posted as required by Utah Code Ann. § 57-1-25 and Utah Code Ann. § 57-1-26. (R.001099)

17. As the time of the Trustee's Sales, the amount owing to the Bank under the 2009 Note and 2009 Loan Agreement was no less than $693,513.97. (R.001098)

18. Under the terms of the 2007 Trust Deed, the Trustee sold the trust properties to the Bank on June 1, 2011 for the sum of $135,000.

19. After the Trustee's Sale under the 2007 Trust Deed, the amount owing on the 2009 Note prior to additional attorney's fees and costs was no less than $558,513.97. (R.001098)

20. Because of the remaining balance owing, the Trustee foreclosed the 2006 Trust Deed as modified, on June 1, 2011. (R.001098)

21. Under the terms of the 2006 Trust Deed, the Trustee sold the trust properties to the Bank for a credit bid of $268,000. (R.001098)

22. The Trustee's Deed relating to the foreclosure sale under the 2006 Trust Deed was executed by the Trustee and recorded on June 6, 2011 as Entry 41867:2011. (R.001098)

23. The Trustee's Deed relating to the foreclosure sale under the 2007 Trust Deed was executed by the Trustee and recorded on June 6, 2011 as Entry 41868:2011. (R.001098)

24. Copies of the Trustee's Deeds are Exhibits N and O to the Bank's Complaint. (R.000007-000002).

25. After the Trust Deeds were foreclosed, the Bank timely commenced a deficiency action against Robertson pursuant to *Utah Code Ann.* § 57-1-32. (R.001098)

26. The Bank alleged in its complaint that the combined credit bids of $403,000 made by the Bank at the foreclosure sales were greater in amount than the fair market value of the Trust Property. (R.001098).

27. Thereafter, the Bank moved for partial summary judgment on the deficiency amount owing by Robertson under the 2009 Note. (R.000326-000323)

28. The district court granted the Bank's motion for partial summary judgment. A copy of the district court's partial summary judgment is attached as Addendum A.

29. Thereafter, the district court conducted a trial in which it determined the fair market value of the trust properties at the time of the foreclosures sales. On September 11, 2013, the district court signed and entered its judgment against Robertson. A copy of the district court's judgment is attached as Addendum Tab B.

30. At the hearing on the motion for summary judgment Robertson's counsel, Thomas E. Anthony, stated that Robertson had mailed by regular mail a request for a payoff statement. (R.001361)

31. Robertson's payoff statement was not sent by an approved delivery method required by *Utah Code Ann.* § 57-1-31.5(1)(a), and was never received by the Trustee. (R.000500-000497).

32. Robertson entered into a written ACH Origination Agreement with the Bank on October 14, 2008 (the "ACH Agreement").[2] (R.000336-000334)

33. The ACH Agreement provided that it could be terminated mutually terminated by written notice by either party. (R.000335) A copy of the ACH Agreement is attached hereto as Addendum Tab C. The ACH Agreement provided that "[t]his Agreement may be terminated on a ten days written notice by either party, provided that applicable portions of this Agreement should remain in effect with respect to any entries initiated by the company prior to such termination." (Id.)

34. In a letter dated September 22, 2010, the Bank's Vice President Jeffrey Rounds sent a letter to Mike Robertson giving notice of termination of the ACH Agreement. (R.000332) A copy of the letter is attached as Addendum Tab D. The letter stated the effective termination date was October 13, 2010. (Id.)

35. On October 12, 2010, Far West, by letter from Jeffrey Rounds, notified Robertson that the effective date of the termination of the ACH Agreement would be October 21, 2010. (R.000330). A copy of the letter is attached as Addendum Tab E.

SUMMARY OF ARGUMENT

1. Robertson defaulted on the consolidated 2009 Note which was secured by the Trust Deeds. Notices of Default were duly recorded and served upon Robertson. Robertson failed to cure the defaults and the trust properties were properly posted, published and noticed for sale and sold at the foreclosure sales. The fair market value of

[2] ACH payments are electronic payments that occur when a customer gives a bank or other person authorization to debit funds directly from the customer's checking or saving account for the purpose of making a payment.

the trust properties was less than the balance owing on the 2009 Note. The district court determined the fair market value of the trust property and entered a money judgment for the deficiency pursuant to *Utah Code Ann.* §57-1-32 (Tab B).

2. On October 14, 2008, the Bank and Robertson entered into the ACH Agreement. (R000336) (Tab C). The ACH Agreement provided for an ACH credit limit of $150,000 comprised of a $75,000 ACH credit limit and a $75,000 ACH debit limit. (Id.) The ACH Agreement provided that it could be terminated by either Robertson or the Bank on ten (10) days written notice. The district court interpreted the Agreement properly and concluded that the Bank had a right to terminate the Agreement. The notice gave Robertson until October 13, 2010 until the Agreement terminated. Thereafter, the Bank extended the effective termination date to October 21, 2010. Robertson was given twenty (20) days' notice of termination. The district court found that the Bank properly terminated the ACH Agreement according to its terms.

3. The e-mail from the Bank's officer, Dan Brian to Robertson in April 2009 (the "Brian e-mail") was not part of the Loan Agreement and did not alter the terms of the ACH Agreement. Brian's e-mail only stated that the Bank would "reinstate" the ACH Agreement. The Bank reinstated the ACH Agreement in early 2009.

4. The district court's legal conclusion that the ACH Agreement was separate and apart from the 2009 Loan Documents was based on uncontroverted facts and the unambiguous loan documents. The 2009 Note was a consolidated note of the 2006 Note and the 2007 Note in the amount of $669,726.32 which was secured by the Trust Deeds. By contrast the 2008 ACH Agreement was an unsecured ACH line of credit in the

amount of $150,000. The ACH Agreement was not mentioned or in any way integrated into the 2009 Loan Documents.

5. The ACH Agreement provided that Robertson or the Bank could terminate the ACH Agreement provided that any applicable portions of the Agreement would remain in effect with respect to any entries initiated by Robertson prior to termination.

6. There was no modification of the ACH Agreement to extend its terms. Robertson's argument that the term of the ACH Agreement was the same as the five year term of 2009 Note is unfounded. The 2006 Note and the 2007 Note, which were consolidated in the 2009 Note, existed before the October 14, 2008 ACH Agreement was executed. Robertson raises this argument for the first time on appeal. There is no evidence of any such a term in the ACH Agreement, in the 2009 Loan Documents or in the Brian e-mail.

7. The district court correctly ruled that the Bank did not breach an implied covenant of good faith and fair dealing by exercising an express term that permitted either Robertson or the Bank to terminate the Agreement. The district court also rejected Robertson's legal argument that a breach of the covenant of good faith and fair dealing should be treated as a tort-type claim.

8. Robertson defaulted on the 2009 Note by failing to make the required payments thereunder. Robertson admitted to the district court that he was in default of the 2009 Note and Loan Agreement and that he failed to make payments due thereunder. Robertson's argument that he did not default on the payment is contrary to the evidence.

9. The trustee conducting the foreclosures sales for the benefit of the Bank gave proper notice of the foreclosure sales by having the notices personally served, published and posted on the trust properties. The notices contained the metes and bounds descriptions of the trust properties as specifically described in the trust deeds.

10. The Bank complied with the provisions of *Utah Code Ann.* § 57-1-31.5. The Trustee never received a request for a payoff statement from Robertson, and the Trustee's sworn affidavit that he did not receive any such request was uncontroverted. Robertson also admitted that he did not serve his request through one of the approved delivery methods provided by the statute.

11. The Trustee complied with *Utah Code Ann.* § 57-1-27 in conducting the foreclosure sales. The Notices of Sale contained the precise legal descriptions contained in the original Trust Deeds executed by Robertson as general partner for Round Peak Natural Seed Farm, Ltd.

12. The district court properly denied Robertson's motion for summary judgment on his alleged breach of the implied covenant of good faith and fair dealing. Robertson's counterclaim that an implied covenant under the ACH Agreement was a tort-type claim rather than a contract claim is contrary to Utah law. The district court also accurately concluded that an implied covenant of good faith and fair dealing could not contradict unambiguous terms of the ACH Agreement.

13. The district court did not abuse its discretion in disallowing the testimony of an appraiser Robertson sought to call during trial. The testimony was properly excluded because: (a) the appraiser and her opinions were not disclosed under Rule 26;

(b) the appraiser and her opinions were not disclosed in compliance with the district court's final pretrial order; (c) the appraiser and her opinions were not disclosed within (60) days of receiving the Bank's expert disclosures and expert report; (d) the appraiser and her opinions were not disclosed at the commencement of trial; (e) the appraiser and her opinions were not disclosed before the district court excused the Bank's expert witness who would have given rebuttal testimony.

ARGUMENT

I. THE 2006 AND 2007 NOTES WERE CONSOLIDATED INTO THE 2009 NOTE AND 2009 LOAN AGREEMENT.

Robertson borrowed money from the Bank under two separate loan transactions made in 2006 and 2007. The loans were secured by the Trust Deeds conveyed by Round Peak Natural Seed Farms, Ltd. The 2006 Note and 2007 Note were consolidated into the 2009 Note which remained secured by the Trust Deeds. The 2009 Loan Agreement was executed with the 2009 Note. The 2009 Note stated:

> COLLATERAL. Borrower acknowledges this Note is secured by the following collateral described in the security instruments listed herein:
>
> (A) a Revolving Credit Deed of Trust dated SEPTEMBER 12, 2007, to a trustee in favor of Lender on real property described as "Real Property located at NNA, SPRINGVILLE, UT 84663" and located in UTAH County, State of Utah;
>
> (B) a Revolving Credit Deed of Trust dated AUGUST 21, 2006, to a trustee in favor of Lender on real property described as "Real Property located at NNA, SPRINGVILLE, UT 84663" and located in UTAH County, State of Utah. (R.000038.)
>
> The 2009 Note and corresponding Loan Agreement were integrated documents.
>
> FINAL AGREEMENT. Borrower understands that this agreement and the related loan documents are the final expression of the

agreement between lender and borrower and may not be contradicted by evidence of any alleged oral agreement. (R.000393).

Robertson defaulted under the 2009 Note and 2009 Loan Agreement, and the foregoing described Trust Deeds were lawfully foreclosed. After the foreclosures were completed, a deficiency action was commenced against Robertson. Thereafter, the district court entered partial summary judgment in favor of the Bank's deficiency claims (Tab A) and then conducted a trial where the court determined the fair market value of the trust properties. The district court entered its deficiency judgment against Robertson on September 11, 2013.

II. THE 2008 ACH AGREEMENT MADE BETWEEN THE BANK AND ROBERTSON WAS SUBJECT TO TERMINATION BY ROBERTSON OR THE BANK UPON TEN DAYS WRITTEN NOTICE.

Robertson contends that an e-mail from Dan Brian to Robertson (i.e., the Brian e-mail) somehow created a separate agreement or caused the ACH Agreement to become integrated with the 2009 Note and Loan Agreement. The Bank disagrees. There is no support for this argument in the Loan Documents, the ACH Agreement or the Brian email. The Brian e-mail merely read: "Mike, upon completion of the new loan documentation, we will reinstate your ACH line. Thanks, Dan Brian." (R.000297.)

The Bank and Robertson agreed to consolidate the 2006 Note and the 2007 Note into the 2009 Note and Loan Agreement and that the 2009 Note and Loan Agreement would remain secured by the 2006 Trust Deed and the 2007 Trust Deed. The 2009 Loan Documents did not address or attempt to modify the 2008 ACH Agreement. Moreover, the Loan Documents could not be modified by parole evidence.

Similarly, the ACH Agreement contained no reference to the 2006 Note, the 2006 Trust Deed, the 2007 Note, or the 2007 Trust Deed which preceded the 2009 Note and 2009 Loan Agreement. As such, the district court correctly determined that Robertson did not have a breach of contract claim stating in part:

> 9. Defendant Robertson does not have a claim for breach of contract arising from the foreclosure of the Trust Deeds, the cancellation of the ACH Agreement or any other loan document or Agreement. The ACH Agreement unequivocally provided that either party could cancel the agreement within ten (10) days' notice. The facts are undisputed that Far West gave more than twenty (20) days' notice of cancellation of the ACH Agreement to Defendant Robertson and therefore Far West fully complied with the termination terms of the ACH Agreement.
>
> 10. Because the Far West Trust Deeds were foreclosed in compliance with their terms and applicable Utah law and because Far West terminated the ACH Agreement pursuant to its terms, Far West did not breach any implied covenant of good faith and fair dealing in connection with any of the foregoing documents or agreements. (R.000687-000686)

On September 22, 2010, approximately a year and a half after the Bank's reinstatement of the ACH Agreement, the Bank sent a letter to Robertson giving him written notice of termination of the ACH Agreement to be effective on October 13, 2010. (R.000531). On October 12, 2010, the Bank wrote a second letter extending the effective date of termination to October 21, 2010. Thus, Robertson was given more than 20 days' notice of termination. (R.000330)("[The] Bank has elected to extend the cancellation dated to October 21st to allow [Robertson] additional time to make alternate ACH arrangements.")

A. The E-mail from Dan Brian was as a Matter of Law Not Part of the Loan Agreement or the Separate ACH Agreement, and it Did Not Alter the Terms of the Written, Executed ACH Agreement.

Dan Brian, on behalf of the Bank, e-mailed Robertson that the Bank would reinstate the written ACH Agreement: "04/30/09 . . .[W]e will reinstate your ACH line." (R.000584). Accordingly, in 2009 the Bank reinstated the ACH Agreement. The Brian e-mail said nothing about changing the terms of the ACH Agreement. It said the Bank will reinstate the ACH Agreement.

The ACH Agreement allowed the Bank to reassess its risk as an unsecured creditor and to terminate the credit arrangement upon ten days' notice. The ACH Agreement did not require a default in payment. Rather, either party could terminate based on a party's sole and exclusive discretion.[3]

In 2010 the Bank decided not to continue the ACH Agreement and complied with the terms of the ACH Agreement when it gave Robertson more than 20 days' notice of termination.

On appeal, for the first time, Robertson argues that the ACH Agreement had the same term of the 2009 Note (which was five years). Applt. 38. ("Was to run at least as long as the new note"). Aplt. Brief at 38. The new argument is baseless. There is nothing in the ACH Agreement which provided for a five year term. The Brian e-mail

[3] The ACH Agreement was a commercial transaction between two businesses in commerce not a consumer transaction. Even Robertson's business transactions were business transactions. R.000554)("All Transactions were Business to Business transactions")

did not say the ACH Agreement would continue in perpetuity or even for the term of the 2009 Note as Robertson contends on appeal.[4]

B. The District Court Did not Err in Interpreting the Loan Documents.

The district court applied the proper tools of contract construction in determining that the ACH Agreement was separate from the 2009 Note and Loan Agreement and could be enforced pursuant to its own terms. The district court recognized that the 2009 Note and Loan Agreement had integration clauses. The 2009 Note provides that "NOTICE OF FINAL AGREEMENT. THE WRITTEN AGREEMENT AND CONTAINED IN THE LOAN DOCUMENTS IS A FINAL EXPRESSION OF THE AGREEMENT BETWEEN BORROWER AND LENDER AND MAY NOT BE CONTRADICTED BY EVIDENCE OF ANY ALLEGED ORAL AGREEMENT." (R000038) Similarly, the 2009 Loan Agreement provides "FINAL AGREEMENT. Borrower understands that the loan documents signed in connection with this loan are the final expression of the Agreement between Lender and Borrower and may not be contradicted by evidence of any alleged oral agreement." (R.000030) Again, the 2009 Loan Documents do not mention or incorporate the ACH Agreement and the ACH Agreement does not reference or incorporate any of loan documents that existed in 2008 when the ACH Agreement was signed.

Robertson cites to *Bullfrog Marina, Inc. v. Lentz*, 501 P.2d 266, 267 (Utah 1972) for the proposition that the separate agreements were somehow interwoven. The Bank disagrees. In *Bullfrog* the Supreme Court indicated that "where two or more instruments

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[4] Even assuming arguendo that the Brian email constituted a binding agreement, the agreement was that the ACH Agreement would be reinstated not that it would have a five year term.

are executed by the same parties contemporaneously, or at different times in the course of the same transaction, and concern the same subject matter, they will be read and construed together...." Here, Robertson borrowed money from the Bank on two separate secured loan transactions in 2006 and 2007. The ACH Agreement was made on October 14, 2008. The 2006 and 2007 Notes on the secured transaction were consolidated into the 2009 Note (R.000039-000036) and corresponding Loan Agreement. (R.000035-000030)

Had the documents been integrated, the 2009 Note and Loan Agreement would have so stated and the 2008 ACH Agreement would have been amended to reflect any necessary changes. Even assuming *arguendo* that they were somehow integrated, the integration of the separate documents would not change the clear and unambiguous terms of those documents. Thus, the secured 2009 Note would have a five year term and the ACH unsecured line of credit would be subject to termination upon 10 days' notice by either party. Robertson mistakenly believes that by somehow showing that the documents were integrated that their respective terms would change. This assumption is misplaced. The district court would still interpret the documents according to their unambiguous terms. Thus, Robertson's integration argument would not change the district court's ruling.

C. The ACH Agreement Provided that Both Parties, the Bank and Robertson, Could Terminate the Agreement on Ten Days' Written Notice.

Robertson's reliance on *Aquagen International v. Cabrae Trust*, 972 P.2d 411 (Utah 1998) is misplaced. In that case the Supreme Court reversed the district court's

decision which sought to enforce contract terms despite the other parties failure to perform and that the contract was unenforceable for failure of consideration. It has no application to the issues on appeal. Robertson's reliance on *Pierce v. Pierce*, 2000 UT, ¶19, 994 P.2d 1930 is also inapplicable. The case addressed a wife's right to enforce a post-nuptial agreement prior to her husband's death in seeking a constructive trust on assets transferred by the husband prior to his death.

D. There Was No Amendment or Modification of the Terms of the ACH Agreement.

The ACH Agreement sets forth a description of the specific operations which permitted Robertson to initiate electronic signals for paperless entries through the Bank to accounts maintained at the Bank and other financial institutions by means of the automated clearing house operated by Northwest Clearing House Association. The ACH Agreement sets forth the specific terms of how the clearing house process would operate and specific requirements of performance. The ACH Agreement, paragraph 14, specifically addressed that upon termination pending transactions would be cleared as follows. "This Agreement may be terminated on a ten days written notice by either party, provided that applicable portions of this agreement shall remain in effect with respect to any entries initiated by the company (i.e., Robertson) prior to such termination." (R.000335)(Tab C). No amendment was ever made to the ACH Agreement, paragraph 14 or any other term. Had an amendment been made, it would have addressed the terms of the ACH Agreement to be changed and would have addressed how pending transactions would be handled upon termination. Robertson bore the burden of proving

that an amendment was made and that such amendment changed paragraph 14. However, he provided no such evidence to the district court. Rather, Robertson illogically argues that the ACH Agreement was implicitly amended because the original 2006 and 2007 Notes, which were secured by real estate, were consolidated into the 2009 Note. Despite however many times he makes the argument, it is unsupported by the documents. Moreover, the course of performance between the parties was to document any material changes. Thus, when the 2006 Note and the 2007 Note were changed, a new consolidated 2009 Note and Loan Agreement were made. Similarly, had the parties decided to change a material term of the ACH Agreement, a superseding document would have been executed. Changing an unsecured ACH line of credit from a risk period of ten days to five years would have been a material change that would have been formally documented.[5]

III. ROBERTSON WAS IN DEFAULT UNDER THE TRUST DEEDS AND THE FORECLOSURE WAS CONDUCTED PURSUANT TO UTAH LAW.

A. The 2009 Note Was In Default.

The facts were undisputed that Robertson was in default of the 2009 Note. He admitted that he ceased making payments under the Loan Agreement. Robertson Decl. ¶50. (R.000546). Robertson also admitted in his answer to the Bank's Interrogatory No. 4 that he failed to make payments on the loan owing to the Bank. (R.000656).

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[5] For example, if the percentage of default transactions, credit or debit, began to fail, the Bank could give ten days' notice of the termination to avoid the possibility of having the outstanding credit transactions exceed the line of credit. Conversely, if the term of the ACH were for five years without a prior right of termination, the Bank would not have the ability to protect itself by terminating the Agreement under multiple breaches or Robertson's insolvency.

He failed to cure those defaults. (R.000462) (uncontroverted facts 13, 14 and 15 of the Bank's memorandum in support of summary judgment) Based on the foregoing, the district court ruled:

> 9. Certain events of default occurred including that Robertson failed to make timely payments under the 2009 Note. As a result, Notices of Default were recorded on January 13, 2011 as Entries 4120:2011 and 4122:2011 with the Utah County recorder's office. The Notices of Default were duly served upon Robertson as the borrower and upon Round Peak Partnership as the trustor under the 2006 Trust Deed and the 2007 Trust Deed.
>
> 10. Defendant Robertson failed to cure the default during the statutory period required by Utah law and the Trust Property was noticed for sale through the substituted trustee's notices (the "Trustee's") of Trustee's Sale. The Notices of Trustee's Sale were duly served on Robertson and Round Peak Partnership and were published and posted as required by *Utah Code Ann.* § 57-1-25 and *Utah Code Ann.* § 57-1-26. (R. 001099)(Tab B)

Robertson has marshalled no evidence to show that the foregoing findings are clearly erroneous or that the conclusions of law are incorrect.

B. The Notices of Default and Notices of Sale Were Properly Given.

Robertson admitted that the Notices of Default and Notices of Sale were properly given. Accordingly, the district court concluded that "[t]he facts are undisputed and Defendant Robertson admitted at hearing that the Notices of Default and Notices of Trustees' Sales were properly served upon and received by Defendant Robertson. There was more than sufficient debt owing to Far West for the foreclosure of the Trust Deeds." (R.000687)(Tab A) Robertson has presented no evidence to establish that the foregoing findings are clearly erroneous or that the conclusions of law are incorrect.

C. The Bank Properly Noticed the Trust Properties for Sale by Using the Legal Descriptions of those Properties.

Robertson executed the 2006 Trust Deed to secure the 2006 Note and the 2007 Trust Deed to secure the 2007 Note. The Notes were later consolidated into the 2009 Note. As stated therein the 2009 Note was secured by both Trust Deeds. The Trust Deeds included metes and bounds descriptions of the trust properties. (R.000067-000059; R.000049-000039) The Notices of Default (R.000022-000021; 000019-000018) and the Notices of Sale contained those precise legal descriptions. (R.000016-000014-000013; R.000010-000009).

Concerning notices of default, *Utah Code Ann.* § 57-1-24(1) provides that such a notice should provide "a legal description of the trust property". Concerning notices of sale, *Utah Code Ann.* § 57-1-25(1) require that "[t]he trustee shall give written notice of the time and place of the sale *particularly describing the property to be sold*;" Id. (italics added). There is nothing in either statute that requires that the tax parcel identification numbers be given. Accordingly, the district court found and concluded that:

> 4. The legal descriptions included in the Trust Deeds, the Notices of Default, the Notices of Sale and Trustee's Deeds were lawful because they contained the metes and bounds descriptions of the trust properties conveyed to secure the loan owing to Far West. A tax parcel identification number, which may be assigned to a property by a county recorder or a county assessor does not constitute a legal description of property under the Utah foreclosure statutes. (R.000688)

Robertson's insistence that the legal descriptions given were insufficient because they did not contain property tax parcels numbers is contrary to the applicable statute. Thus, Robertson has not established that the district court's conclusion is incorrect.

D. Robertson Failed to Send a Lawful Request for a Payoff Statement.

Utah Code Ann. § 57-1-31.5(2)(a)(ii)(B) provides that an interested party may

request a payoff statement from the trustee. "A request for a payoff statement is not timely unless the trustee receives the request at least 10 business days before the trustee's sale." Id. Here, the Trustee's Notices of Sales were schedule for June 1, 2011. Thus, given the exclusions of weekends Robertson's request for a payoff statement had to be *received* by the Trustee by Wednesday May 18, 2011. While Robertson asserted at the hearing on partial summary judgment that he mailed a request for payoff on May 16, 2011, the Trustee never received a payoff request from Robertson at any time prior to the foreclosure sales. The Trustee testified in his Affidavit as follows:

> 20. Robertson has asserted that on or about May 16, 2011 he mailed to me a request for a pay-off statement via priority mail.
>
> 21. However, at no time did I ever receive any such written request from Robertson via priority mail or by any other written means.
>
> 22. At no time did I ever receive a certified mailing return receipt requested from Mike Robertson in which he requested a payoff statement prior to the foreclosure sale.
>
> 23. At no time has Robertson provided me with any certified mailing which I signed or refused to sign. (R.000497).

The Trustee's sworn testimony was never controverted and Robertson never submitted any evidence that the Trustee ever received his request. In enacting the foregoing section the Utah legislature surely contemplated possible disputes concerning the receipt of a mailing. As such, the statute requires that a request for payoff be made through an "approved delivery method". An "approved delivery method" is one sent by certified or registered mail *with return receipt requested* or by a nationally recognized letter or package delivery or carrier service operating in the state that provides a service for

tracking the delivery of an item; or documentation that the item was received by the intended recipient; or that the person refused to accept delivery. *Utah Code Ann.* § 57-1-31.5(1)(a).

Robertson's counsel, Thomas E. Anthony, stated at the hearing on Plaintiff's Motion for Summary Judgment on Robertson's Counterclaim, that Robertson "mailed it on the 16th with the United States Post Office in priority mail." Transcript of Hearing, March 21, 2013, p. 32, lines 11–12. (R.001361). Based upon his admission that the request was not sent by an "approved delivery method" he failed to comply with the statute by his own admission. Thus, Robertson failed to present any evidence that the request was received by the Trustee to lawfully controvert the Trustee's affidavit which became an uncontroverted fact for purposes of summary judgment. *See Portfolio Recovery Associates, LLC v. Migliore,* 2013 UT App. 255, ¶10, 314 P.3d 1069 ("Where the nonmoving party fails to file responsive affidavits or other evidentiary material allowed by rule 56(e), we accept as undisputed the facts presented by the movant. *Scott v. Majors*, 1999 UT App 139, ¶ 17, 980 P.2d 214.") The district court, after reviewing the uncontroverted facts, found there was no evidence that the Trustee had received a payoff statement.

E. The Trustee Complied with Section 57-1-27 in Conducting the Trust Deed Sales.

Robertson's claim that he did not know the accurate legal descriptions of the trust properties conveyed under the Trust Deeds being foreclosed is unfounded. Robertson executed each of the Trust Deeds as a general partner of Round Peak Natural Seed Farms,

Ltd. (R.000061-000060; R.000041). By executing the Trust Deeds he surely knew of the trust properties conveyed. Robertson was also served with and received Notices of Default under the Trust Deeds. (R.000023-000018) He was also served with the Notices of the Trustee's Sales. The Notices of Default (R.000022-000021; 000019-000018) and the Notices of Sale contained the precise legal descriptions of the trust properties (R.000016-000014-000013; R.000010-000009) to be foreclosed and precise references to both Trust Deeds. (Id.) Robertson's assertion that he was not certain about what was being sold would have occurred only if he failed to read the Notices of Default and the Notices of Sale. Even if Robertson had a mistaken belief that only one parcel was going to be sold, the lawfulness of the Notices of Sale served upon Robertson, rather than his state of mind, govern. Those Notices clearly show that all the trust properties were being sold.

IV. THE COURT WAS CORRECT IN DENYING ROBERTSON'S MOTION FOR SUMMARY JUDGMENT.

A. The District Court Properly Dismissed Robertson' Breach of Contract Claim.

The district court found that Robertson did not have a claim for breach of contract arising from the foreclosure of the Trust Deeds, the cancellation of the ACH Agreement or any other loan document or agreement. (R.000687.) There is nothing in the Brian e-mail that contradicts the express, unambiguous, written terms of the ACH Agreement. Paragraph 14 provided that either party could terminate the ACH Agreement upon ten days' written notice. (R.000336-000334) (Tab C) Again, Robertson's reliance on the Brian e-mail to support a breach of contract claim is misplaced. There is nothing in that e-mail that amended or modified the unambiguous terms and conditions of the ACH

Agreement.

Robertson again argues that the Brian e-mail was a contract where Robertson agreed to sign the documents for the Loan Agreement and the Bank agreed to reinstate the written ACH Agreement. The e-mail was merely a reminder that Robertson would not have his property foreclosed under the Loan Agreement if he brought his default current. It also stated that the Bank would reinstate the separate, unsecured written ACH Agreement. The Bank did that. Even assuming arguendo that the Brian e-mail was a contract, the Bank reinstated the ACH Agreement. The Brian e-mail provides no basis for a claim that the unsecured ACH Agreement would be amended to endure for the five year term of the 2009 Note. It is incredulous for Robertson to argue without any written evidence of modification to the ACH Agreement that the unambiguous terms of the ACH Agreement were somehow modified. The district court did not err in interpreting the ACH Agreement and concluding as follows:

> 9. Defendant Robertson does not have a claim for breach of contract arising from the foreclosure of the Trust Deeds, the cancellation of the ACH Agreement or any other loan document or Agreement. The ACH Agreement unequivocally provided that either party could cancel the agreement within ten (10) days' notice. The facts are undisputed that Far West gave more than twenty (20) days' notice of cancellation of the ACH Agreement to Defendant Robertson and therefore Far West fully complied with the termination terms of the ACH Agreement. (R.000587)

B. The District Court Correctly Dismissed Robertson's Claim Based Upon The Implied Covenant Of Good Faith And Fair Dealing.

In his counterclaim Robertson alleged that the agreement contained an implied covenant of good faith and fair dealing that the parties would deal with each other in good faith and the Bank breached that covenant by foreclosing the trust deeds that

secured the 2009 Note and Loan Agreement. (R.000087)

The district court disagreed and applied this Court's precedence that "[t]here is no violation of the duty of good faith and fair dealing, as a matter of law, when a party is simply exercising its contractual rights." *PDQ Lube Center, Inc. v. Huber*, 949 P.2d 792, 798 (Utah Ct. App. 1997) (citing *Howe v. Professional Manivest, Inc.*, 829 P.2d 160, 163 (Utah App. 1992) (emphasis added). "[The covenant of good faith and fair dealing] cannot be read to establish new independent rights or duties to which the parties did not agree ex ante . . . . Second this covenant cannot create rights and duties inconsistent with express contractual terms." *Oakwood Village, LLC v. Albertsons, Inc.*, 104 P.3d 1226, 1240 (Utah 2004). The covenant of good faith and fair dealing "cannot be construed to establish new independent rights or duties not agreed upon by the parties." *Id.* at 798 (citing *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 55 (Utah 1991).

After reviewing and considering the specific terms of the 2009 Loan Documents and the ACH Agreement, the district court determined that the Bank's actions were in compliance with the ACH Agreement and 2009 Loan Documents:

> Because the Far West Trust Deeds were foreclosed in compliance with their terms and applicable Utah law and because Far West terminated the ACH Agreement pursuant to its terms, Far West did not breach any implied covenant of good faith and fair dealing in connection with any of the foregoing documents or agreements."

(R.000686)(Tab A).

In an effort to circumvent the opinions of this Court and the Supreme Court, that the implied covenant of good faith and fair dealing is an implied contract covenant, Robertson, through his counsel who previously practiced in California, argued that the

district court should treat the alleged breach of an implied covenant of good faith and fair dealing as a tort-type claim rather than a contract claim. The district court acknowledged that California case law treats it as a tort but that Utah law does not. The district court refused to allow the legal doctrine to be used to contradict express terms of the parties' agreements:

> The Court also rejects Robertson's argument that the implied covenant of good faith and fair dealing may be treated as a tort-type claim or that an implied covenant of good faith and fair dealing may contradict specific written terms of an agreement.

(R. 000686) (Tab A)

C. The District Court Correctly Dismissed Robertson's Claim for Negligence.

The economic loss doctrine is a basis for dismissing Robertson's claim for negligence. It is well-settled under Utah law that a plaintiff may not recover "economic" losses under a non-intentional tort theory. *See Am.Towers Owners' Ass'n. v. CCI Mech., Inc.*, 930 P.2d 1182, 1189 (Utah 1996); *Maack v. Resource Design & Cosntr., Inc.,* 875 P.2d 570, 579-80 (Utah Ct. app. 1984). The economic loss doctrine bars tort claims when the conflict arises out of a contract, unless there is an independent, non-contractual duty. *Grynberg v. Questar Pipeline Co.*, 70 P3d 1, (Utah 2003) ("[W]hen parties' difficulties arise directly from a contractual relationship, the resulting litigation concerning those difficulties is one in contract no matter what words the plaintiff may wish to use in describing it.") (*quoting Snyder v. Lovercheck,* 992 P.2d 1079, 1088 (Wyo. 1999)); *see also Hermansen v. Tasulis,* 48 P.3d 235 (Utah 2002). The doctrine applies to all negligence based claims, including a claim for negligent misrepresentation. *See SME Indus., Inc. v. Thompson,*

Ventulett, Stainback & Assoc., Inc., 28 P.3d 669, 683 (Utah 2001) (holding that claims for negligent misrepresentation are barred under the economic loss doctrine because, otherwise, "parties could essentially sidestep contractual duties by bringing a cause of action in tort to recover the very benefits they were unable to obtain in contractual negotiations"); *see also Hafen v. Strebeck*, 338 F. Supp. 2d 1257, 1265 (D. Utah 2004) (barring negligent misrepresentation claim based on economic loss doctrine).

In this case, the relationship between Robertson and the Bank was clearly one based in contract. Robertson was a party to the Notes and the Loan Agreements and the Bank was the lender. Nevertheless, Robertson claims that the Bank negligently administered his contracts with the Bank. Robertson alleged that the Bank failed to notice, advertise for sale and sell all of trust properties conveyed as collateral. Robertson cannot seek damages for an alleged breach of the 2009 Loan Documents and also sue the Bank for allegedly negligently performing or administering those contracts. At the hearing before the district court Robertson (through his counsel) recognized the economic loss doctrine and stipulated to the dismissal of the negligence claim. Accordingly, the district court in its summary judgment ruled as follows:

> 8. The counterclaim in negligence against Far West should be dismissed because it is barred by the economic loss doctrine as that doctrine has been applied by the Utah courts. In addition, Robertson stipulated at hearing that the negligence claim against Far West could be dismissed with prejudice. (R.000687)

Robertson has failed to establish any error in the district court's summary judgment.

D. The District Court Correctly Dismissed Robertson's Claim for Unjust Enrichment.

The Utah Supreme Court has determined that the doctrine of unjust enrichment or quantum meruit does not apply when there was an express or implied contract covering the subject of the litigation. *See Mann v. American Western Life Ins. Co.*, 586 P.2d 461, 465 (Utah 1978) ("Recovery in quasi contract is not available where there is an express contract covering the subject matter of this litigation"); *Davies v. Olson*, 746 p.2d 264, 268 (Utah App. 1987) ("Recovery under quantum meruit presupposes that no enforceable written or oral contract exists."); *see also Concrete Products Co. v. Salt Lake County*, 734 P.2d 910, 911 (Utah 1987).

The facts are undisputed in this case that there were written agreements between Robertson and the Bank governing the matters in dispute. Robertson alleges in his counterclaim that the Bank breached those agreements by recording a "trustee's deed in favor of Far West Bank on four parcels of property when they only sold one." (R.000086) The terms of the 2009 Loan Documents governed the Bank's remedies if Robertson defaulted on the Note, and how the foreclosure sales of the trust properties would be conducted. Accordingly, the district court ruled that:

> 12. Utah law bars a claim for unjust enrichment when there are written agreements governing the subject matter upon which the unjust enrichment claim is based. The facts are undisputed that there were written loan agreements made between Far West and Defendant Robertson concerning the subject matter of Defendant Robertson's unjust enrichment claim. Therefore, Defendant Robertson's claim for unjust enrichment should be dismissed with prejudice. (R.000686) (Tab A)

In sum, the district court correctly dismissed Robertson's four counterclaims based upon the uncontroverted facts and applicable law.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN

EXCLUDING ROBERTSON'S UNDISCLOSED EXPERT WITNESS.

The district court properly excluded Robert's undisputed expert witness for numerous reasons. First, Robertson failed to disclose the witness in compliance with Rule 26 which governed at time.

Second, Robertson failed to disclose his expert appraiser and her report in his initial disclosures and he never supplemented those disclosures. He violated Rule 26(a)(4)(A) of the Utah Rules of Civil Procedure. [6]

Third, Robertson violated the district court's instructions given to the parties at the final pretrial conference that all documents had to be disclosed prior to trial. The court warned Robertson early on that if he did not disclose documents, the court would not admit them into evidence. "The Court: - - to set, just so you both know . . . If you don't disclose documents, I don't let them into evidence . . ." Pre-Trial Conference transcript p.5, lines 12-15. February 29, 2012 (R.001360).

Fourth, Robertson also violated Rule 26(a)(4)(C)(ii) which provided that "[t]he party who does not bear the burden of proof on the issue for which expert testimony is offered shall serve on the other parties the information required by paragraph (a)(4)(A)

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[6] "A party shall, without waiting for a discovery request, serve on the other parties the following information regarding any person who may be used at trial to present evidence under Rule 702 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case . . . : (i) the expert's name and qualifications . . . and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years, (ii) a brief summary of the opinions to which the witness is expected to testify, (iii) all data and other information that will be relied upon by the witness in forming those opinions, and (iv) the compensation to be paid for the witness's study and testimony." Utah R. Civ. P. 26(a)(4)(A) (2013).

within seven days after the later of (A) the date on which the elective under paragraph (a)(4)(C)(i) is due, or (B) receipt of the written report or the taking of the expert's deposition . . . ."

Fourth, Robertson failed to disclose or even mention the expert witness at the commencement of trial.

> Mr. Call: Your – your honor, he hasn't even provided us with a copy of that document.
>
> Court: Oh. Do you have an extra copy for them? But I - - I'll just state that all of these rules, to the Court's mind, were put in place for one purpose – well, the main purpose being to avoid at the end of the day what was colloquially referred to as trial by ambush and that's when we show up at trial and things start coming out that nobody knows anything about. Even if, for the sake of argument, the first time you had seen their appraisal had been 30 days ago and then you wanted to do a response two weeks later and even if you had only got the report four days ago, at a minimum, it should have been given to the Plaintiff at that time. And let's say you didn't even have it til last night, it should have been handed to them before we started the trial, but – but to get in the middle of a trial and start wanting to put on non-disclosed evidence or witnesses is just not how we proceed . . . . That just turns into a situation that's just patently unfair and so I'm not going to . . . allow it. Trial Transcript p. 143, lines 17 -25 through p. 144 lines, 1-13. (R.001362).

Fifth, Robertson withheld the identity of his expert witness and her appraisal until after the Bank had rested its case and the Bank's expert appraiser had been excused by the court with Robertson stating he had no reason for the Bank's expert to remain in the courthouse. "Mr. Dibble: Your Honor, may Mr. Reeves be excused? The Court: Any reason for him to remain, Mr. Robertson? Mr. Robertson: No, your Honor. The Court:

Okay. He may be released." Trial Transcript, p. 105, lines 8-12. (R.1362).[7]

Sixth, Robertson's witness was a rebuttal witness who needed to be disclosed. Robertson told the court that the expert was a "rebuttal" witness. "Robertson: I would like to your Honor. Can I call a witness in rebuttal of the – the – the plaintiff's expert witness? . . . . The Court: And who's that? Robertson: Sue Kimball. The Court: Has that been disclosed? Mr. Robertson: Has not. The Court: Okay. I'm not going to allow you to call any expert witness whose report hasn't been provided to the plaintiff. Mr. Robertson: Okay." Trial Transcript pp. 116-17, lines 24-25 and 1-11. (R.1362),

Finally, it would have been prejudicial to the Bank had Robertson been able to present an undisclosed expert witness with undisclosed opinions with an undisclosed appraisal report. The Bank's counsel would have had no opportunity to review her opinions with the Bank's expert, to investigate the appraiser or to prepare for cross examination.

Based upon the foregoing, the district court's judgment provided as follows: "The Court refused to permit an expert witness to appear and testify for Robertson because the expert witness had never been identified or disclosed until the witness was called to testify at trial." (R.001096) (Tab B) The district court's determination of inadmissibility was not an abuse of discretion.

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[7] Robertson's reliance on *Glacier Land Co. v. Claudia Klawe Assoc.*, 2006 UT App. 516, 154 P.3d 852 is misplaced. In that case the trial court exercised its discretion and allowed a non-disclosed witness to be used to impeach a single statement made by Klawe. Here, Robertson sought to call an undisclosed appraiser to testify as to the fair market value of trust properties which was the primary issue at trial.

VI. THE BANK IS ENTITLED TO REASONABLE ATTORNEYS' FEES.

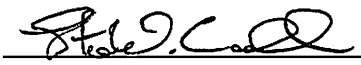
The Bank is entitled to an award of reasonable attorneys' fees on appeal pursuant to Utah R. App. P. 24(a)(9). The 2009 Note contains a covenant for the award of attorneys' fees including attorneys' fees incurred on appeal. (R.000432). The Trust Deeds also contain covenants for an award of attorneys' fees regarding appeals. (R.000426). The award of reasonable attorneys' fees in favor of the Bank is also supported by *Utah Code Ann § 57-1-32* which provides that "[i]n any action brought under this section, the prevailing party shall be entitled to collect its costs and reasonable attorney fees incurred." Id.

CONCLUSION

The district court, after showing great patience carefully examined the uncontroverted material facts and correctly applied the law. The district court correctly dismissed Robertson's four counterclaims for relief and correctly granted the Bank's motion for partial summary judgment. As such, the district court's summary judgment against Robertson's counterclaim and partial summary judgment in favor of the Bank should be affirmed. The Court also made accurate findings of fact based upon the oral and documentary evidence presented at trial. Based upon those findings of fact, the district court made its conclusions of law and judgment against Robertson. The district court also properly considered and denied Robertson's motion for a new trial. As such, the district court's Judgment against Robertson should be affirmed, and the Bank should be awarded is reasonable attorneys' fees incurred on appeal.

DATED this 5th day of July, 2016.

RAY QUINNEY & NEBEKER, P.C.



Steven W. Call
Jonathan A. Dibble
Attorneys for Appellee AmericanWest Bank f.k.a. Far West Bank

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 2016, I served a copy of **Appellee's Opening Brief** via first class US mail, postage pre-paid and an electronic mail copy to the following:

Mike L. Robertson
544 North 880 East
Springville, UT 84663
Email: megus@usa.com

/s/

Certificate of Compliance with Rule 24(f)(1)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements.

1. This Brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because this brief contains 11291 number of words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P.27(b) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in Times New Roman font size 13.

Dated this 5th day of July, 2016.

RAY QUINNEY & NEBEKER, P.C.

Steven W. Call
Jonathan A. Dibble
Attorneys for Appellee AmericanWest Bank f.k.a Far West Bank

1379023

APPELLEE'S ADDENDUM TAB A

The Order of Court is stated below:
Dated: April 25, 2013 06:09:15 PM
/s/ David Mortensen
District Court Judge

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

FAR WEST BANK, a division of AmericanWest Bank, a Washington Corporation, Plaintiff and Counter-Defendant, vs. MIKE L. ROBERTSON, an individual Defendant and Counterclaimant.	**SUMMARY JUDGMENT AGAINST MIKE L. ROBERTSON'S COUNTERCLAIM** **AND** **PARTIAL SUMMARY JUDGMENT IN FAVOR OF FAR WEST BANK** Civil No. 110402516 Hon. David Mortensen

On March 21, 2013, a hearing was held before the Court on Far West Bank's (hereinafter "**Far West**") motion for summary judgment on the counterclaim filed against it by Defendant Mike L. Robertson (hereinafter "**Robertson**"), Far West's motion for partial summary judgment on its deficiency claim against Defendant Robertson, and Defendant Robertson's motion for summary judgment against Far West. Steven W. Call and Jonathan A. Dibble of Ray, Quinney & Nebeker P.C. appeared on behalf of Far West. Defendant Robertson appeared with attorney Thomas E. Anthony, (hereinafter "**Attorney Anthony**") who made a limited appearance. The Court having considered the claims, counterclaims and legal positions at issue in the case, having heard the argument of counsel, and for cause appearing, hereby finds, concludes and orders as

follows:

FINDINGS OF UNDISPUTED FACTS AND CONCLUSIONS OF LAW

1. On March 21, 2013, Attorney Anthony appeared at the hearing with Defendant Robertson and moved the Court for leave to make a limited appearance for the purpose of representing Defendant Robertson at the hearing. No objection to the limited appearance was made by Far West and the Court determined that Attorney Anthony should be permitted to make a limited appearance for Defendant Robertson.
2. At hearing the Court heard and considered arguments and counter-arguments made by the respective attorneys in support and opposition to Far West' motion for summary judgment against Defendant Robertson's counterclaim, Far West's motion for partial summary judgment against Defendant Robertson, and Defendant Robertson's motion for summary judgment against Far West.
3. During argument Defendant Robertson admitted to and stipulated that the 2009 Promissory Note made in favor of Far West was secured by the 2006 o Trust Deed and the 2007 Trust Deed which had been conveyed for the benefit of Far West (hereinafter the "**Trust Deeds**");
4. The legal descriptions included the Trust Deeds, the Notices of Default, the Notices of Sale and the Trustee's Deeds were lawful because they contained the metes and bounds descriptions of the trust properties conveyed to secure the loan owing to Far West. A tax parcel identification number, which may be assigned to a property by a county recorder or a county assessor, does not constitute a legal description of property under the Utah foreclosure statutes.

5. The facts are undisputed and Defendant Robertson admitted at hearing that the Notices of Default and Notices of Trustees' Sales were properly served upon and received by Defendant Robertson. There was more than sufficient debt owing to Far West for the foreclosure of the Trust Deeds.

6. The foreclosures of the Trust Deeds were lawfully conducted in compliance with the terms of the Trust Deeds and Utah law. Therefore, the Court should grant partial summary judgment in in favor of Far West against Defendant Robertson and conduct a brief evidentiary hearing on the following two issues: (a) the calculation of the balance owing under the 2009 Note at the time of the foreclosure sales and the fair market value of the trust properties at the time of the foreclosure sales.

7. The counterclaim filed by Defendant Robertson against Far West should be dismissed with prejudice for the following reasons.

8. The counterclaim in negligence against Far West should be dismissed because it is barred by the economic loss doctrine as that doctrine has been applied by the Utah courts. In addition, Robertson stipulated at hearing that the negligence claim against Far West could be dismissed with prejudice.

9. Defendant Robertson does not have a claim for breach of contract arising from the foreclosure of the Trust Deeds, the cancellation of the ACH Agreement or any other loan document or Agreement. The ACH Agreement unequivocally provided that either party could cancel the agreement within ten (10) days' notice. The facts are undisputed that Far West gave more than twenty (20) days' notice of cancellation of the ACH Agreement to Defendant Robertson and therefore Far

West fully complied with the termination terms of the ACH Agreement.

10. Because the Far West Trust Deeds were foreclosed in compliance with their terms and applicable Utah law and because Far West terminated the ACH Agreement pursuant to its terms, Far West did not breach any implied covenant of good faith and fair dealing in connection with any of the foregoing documents or agreements.

11. The Court also rejects Defendant Robertson's argument that the implied covenant of good faith and fair dealing may be treated as tort-type claim or that an implied covenant of good faith and fair dealing may contradict specific written terms of an agreement.

12. Utah law bars a claim for unjust enrichment when there are written agreements governing the subject matter upon which the unjust enrichment claim is based. The facts are undisputed that there were written loan agreements made between Far West and Defendant Robertson concerning the subject matter of Defendant Robertson's unjust enrichment claim. Therefore, Defendant Robertson's claim for unjust enrichment should also be dismissed with prejudice.

ORDER AND JUDGMENT

Based upon the foregoing findings of undisputed facts and conclusions of law, the Court hereby ORDERS, ADJUDGES and DECREES as follows:

1. The motion for leave to make a limited appearance on behalf of Defendant Robertson made by Attorney Anthony is granted and his limited appearance is approved by the Court;

2. Far West Bank's Motion for Summary Judgment against the counterclaims filed

against it by Defendant Robertson is hereby granted and all counterclaims alleged against Far West by Defendant Robertson are hereby dismissed with prejudice;

3. Far West's Motion for Partial Summary Judgment against Defendant Robertson is granted all on issues and claims with the exception that the Court will conduct a brief evidentiary hearing to determine the balance owing to Far West by Defendant Robertson under the 2009 Note and the fair market value of the trust properties at the time of the foreclosure sales; and

4. Defendant Robertson's motion for summary judgment against Far West is hereby denied with prejudice.

DATED this ____ day of April, 2013.

BY THE COURT

_____
HON. DAVID N. MORTENSON
District Court Judge

Approved as to form and content:

_____
Mike L. Robertson

_____
Thomas E. Anthony
Limited Appearance Attorney for Mike L. Robertson

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing **SUMMARY JUDGMENT AGAINST MIKE L. ROBERTSON'S COUNTERCLAIM AND PARTIAL SUMMARY JUDGMENT IN FAVOR OF FAR WEST BANK** was mailed, postage prepaid, on this __5th___ day of April, 2013 to the following:

Mike L. Robertson
444 W. Center
Provo, UT 84601

Thomas E. Anthony
389 North University Ave.
Provo, UT 84603

/s/ Steven W. Call

APPELLEE'S ADDENDUM TAB B

The Order of Court is stated below:
Dated: September 11, 2013 11:27:41 AM
/s/ David Mortensen
District Court Judge

Prepared and submitted by:

STEVEN W. CALL (5260)
JONATHAN A. DIBBLE (0881)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500
Facsimile (801) 532-7543

Attorneys for Plaintiff AmericanWest Bank

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

AMERICANWEST BANK, a Washington Corporation, formerly doing business in Utah as Far West Bank, Plaintiff and Counter-Defendant, vs. MIKE L. ROBERTSON, an individual, Defendant and Counterclaimant.	[Proposed] **JUDGMENT AGAINST MIKE L. ROBERTSON** Civil No. 110402516 Hon. David Mortensen

On July 2, 2013, a trial was held before the Court on the deficiency claims alleged against Mike L. Robertson. Far West Bank, now known as AmericanWest Bank ("**AmericanWest**") was represented by Jonathan A. Dibble and Steven W. Call of Ray Quinney & Nebeker P.C. Defendant Robertson appeared and defended himself. The Court having considered the evidence presented to the Court at trial including the testimony given by witnesses and having received

into evidence documents and related materials and having heretofore signed and entered its prior order of summary judgment against Defendant Robertson and partial summary judgment in favor of AmericanWest, hereby makes its findings, conclusions and judgment against Defendant Mike L. Robertson ("Robertson") as follows:

FINDINGS OF FACT

1.Defendant Robertson entered into a loan transaction with AmericanWest on August 21, 2006. In connection with the loan Defendant Robertson, executed a Promissory Note (the "2006 Note") in the amount of $230,000 in favor of AmericanWest.

2.As part of the loan transaction Round Peak National Seed Farms, Ltd. (the "Round Peak Partnership") through its general partner, Robertson, executed a Revolving Credit Deed of Trust (the "2006 Trust Deed") in favor of AmericanWest, as trustee and beneficiary, to secure the 2006 Note.

3.The 2006 Trust Deed conveyed to the trustee the power to sell the trust property described therein on Exhibit A as 67.4 acres of hillside land at approximately 500 North 1100 East, Springville, Utah (the "Trust Property"). The 2006 Trust Deed was recorded on October 10, 2006 as Entry 109306:2006 in the Utah County Recorder's Office.

4.On October 6, 2006, the Round Peak Partnership, through its general partner, Robertson, executed a modification of the amount of 2006 Trust Deed from $230,000 to $500,000.00. The modification was recorded on October 10, 2006 as Entry No. 134222:2006 in the Utah County recorder's office.

5.On September 12, 2007, Robertson executed a Promissory Note (the "2007 Note") in the amount of $250,000.00 in favor of AmericanWest in exchange for a loan of

$250,000.00. As part of the loan transaction, the Round Peak Partnership executed, through its general partner, Robertson, a Revolving Credit Deed of Trust (the "2007 Trust Deed") in favor of AmericanWest, as trustee and beneficiary, to secure the payment of a revolving line of credit.

6.The 2007 Trust Deed was recorded September 13, 2007 as Entry No. 134636:2007 in the Utah County recorder's office. The 2007 Trust Deed granted to the trustee the power to sell the Trust Property described therein. The 2006 Trust Deed and the 2007 Trust Deed both encumbered the same Trust Property.

7.On April 23, 2009, Defendant Robertson executed a Promissory Note (the "Note 2009") in the amount of $669,726.32 in favor of AmericanWest. The promissory note consolidated obligations owing under the 2006 Note and the 2007 Note.

8.The obligations owing under the 2009 Note were secured by the 2006 Trust Deed (as modified) and the 2007 Trust Deed.

9.Certain events of default occurred including that Robertson failed to make timely payments under the 2009 Note. As a result, Notices of Default were recorded on January 13, 2011 as Entries 4120:2011 and 4122:2011 with the Utah County recorder's office. The Notices of Default were duly served upon Robertson as the borrower and upon Round Peak Partnership as the trustor under the 2006 Trust Deed and the 2007 Trust Deed.

10.Defendant Robertson failed to cure the default during the statutory period required by Utah law and the Trust Property was noticed for sale through the substituted trustee's notices (the "Trustee's") of Trustee's Sale. The Notices of Trustee's Sale were duly served on Robertson and Round Peak Partnership and were published and posted as required by *Utah Code Ann.* § 57-1-25 and *Utah Code Ann.* § 57-1-26.

11.On the date of the Trustee's Sales the amount due and owing to AmericanWest under the 2009 Note was no less than $693,513.97, plus additional attorneys' fees and costs.

12.Under the terms of the 2007 Trust Deed, the Trustee sold the Trust Property to AmericanWest on June 1, 2011 on or around 2:00 p.m. for the sum of $135,000 in accordance with the terms and conditions in the 2007 Trust Deed and pursuant to Utah law including *Utah Code Ann.* § 57-1-23 through § 57-1-28 (as amended). The Trustee's Deed relating to the foreclosure sale was duly executed by the Trustee and recorded on June 6, 2011 as Entry 41867:2011. After the foregoing sale, the amount owing on the 2009 Note, prior to additional attorneys' fees, costs etc. was no less $558,513.97.

13.The Trustee foreclosed the 2006 Trust Deed, as modified, on June 1, 2011 on or around 2:15 p.m. Under the terms of the 2006 Trust Deed, the Trustee sold the Trust Property to AmericanWest for the sum of $268,000 in accordance with the terms and conditions in the 2006 Trust Deed, as modified, and pursuant to Utah law including *Utah Code Ann.* § 57-1-23 through § 57-1-28 (as amended). The Trustee's Deed relating to the foreclosure sale under the 2006 Trust Deed was duly executed by the Trustee and recorded on June 6, 2011 as Entry 41868:2011.

14.After the Trust Deeds were foreclosed, AmericanWest timely commenced a deficiency action against Defendant Robertson pursuant to *Utah Code Ann.* § 57-1-32. AmericanWest alleged in its complaint that the combined credit bids of $403,000 made by AmericanWest at the foreclosure were greater in amount than the fair market value of the Trust Property. Nevertheless, AmericanWest sought its deficiency balance based upon the credit-bid sum of $403,000.

15.Defendant Robertson answered and counterclaimed against AmericanWest

alleging several claims for relief.

16.After discovery was conducted, cross motions for summary judgment were filed by the parties, and a hearing was held before the Court on the motions. After considering the materials filed in support and opposition to the motions and having heard the argument of counsel, the Court granted AmericanWest's motion for summary judgment against Defendant Robertson's counterclaims. AmericanWest's Motion for Partial Summary Judgment against Defendant Robertson was also granted all on issues and claims with the exception that the Court would conduct a trial to determine the balance owing Defendant Robertson to AmericanWest by under the 2009 Note and the fair market value of the Trust Properties at the time of the foreclosure sales. The Court scheduled a trial to commence on July 2, 2013.

17.The Court previously signed and entered its Summary Judgment against Mike L. Robertson's Counterclaim and Partial Summary Judgment in Favor of Far West Bank.

18.On July 2, 2013, a trial was held before the Court on the remaining issues in the case. Jonathan A. Dibble and Steven W. Call of Ray Quinney & Nebeker P.C. appeared on behalf of AmericanWest, and Defendant Robertson appeared on his own behalf.

19.Brian Guevara, a bank officer for AmericanWest, appeared and testified on behalf of AmericanWest concerning the balance owing to AmericanWest at the time the Trust Deeds were foreclosed, the application of the proceeds from the foreclosure sale, and the calculation of the deficiency balance owing to AmericanWest. Various exhibits were presented and received by the Court during Mr. Guevara's examination.

20.Travis Reeves, an MAI appraiser, appeared as an expert witness and testified

concerning the fair market value of the Trust Property at the time the foreclosure sales were conducted. The Court received into evidence his appraisal report and his opinion as to the fair market value of the Trust Property at the time of the foreclosure sales. Mr. Reeves opined that the fair market value of the Trust Property at the time of the foreclosure sales was $340,000, which is less than $63,000 less than the sum credit bid by the Bank.

21. The Court received into evidence AmericanWest's Exhibits 1 through 29 through testimony given by Brian Guevara and/or Travis Reeves.

22. Defendant Robertson was also called as a witness. He gave testimony concerning facts relating to the value of the Trust Property at the time of the foreclose sales. The Court also received various exhibits into evidence presented by Defendant Robertson. The Court refused to permit an expert witness to appear and testify for Robertson because the expert witness had never been identified or disclosed until the witness was called to testify at trial.

23. At the conclusion of the hearing the Court received into evidence an attorneys' fee affidavit for AmericanWest which provided detailed information concerning the attorneys' fees and costs incurred by AmericanWest in the case.

CONCLUSIONS OF LAW

24. The Court has subject matter jurisdiction over this action pursuant to *Utah Const. art. VIII,* § 5 and *Utah Code Ann.* § 78A-5-102.

25. The Court has personal jurisdiction over Defendant Robertson pursuant to the service of process made upon him and pursuant to his appearance in the case. The Court has personal jurisdiction over AmericanWest pursuant to its appearance in the case.

26.Venue is proper in the Fourth District Court in and for Utah County, State of Utah pursuant to *Utah Code Ann.* §§ 78B-3-301 and 304 because the deficiency action commenced by AmericanWest relates to the foreclosure of real property located in Utah County.

27.Based upon the testimony presented at trial and the documents received into evidence, the Court concludes by a preponderance of evidence that the total indebtedness owing by Defendant Robertson at the time the trust property was foreclosed on June 1, 2011 was $693,513.97.

28.Based upon the testimony given at trial and the documents received into evidence which set forth the calculation of indebtedness, the Court concludes by a preponderance of evidence that the total indebtedness was reduced by the credit bids by AmericanWest in the sum of $403,000, of which $27,785.98 was applied to interest and $375,214.02 was applied to principal in compliance with the loan documents.

29.Based upon the testimony given at trial and the documents received into evidence, the Court concludes that the fair market value of the property in the amount of $340,000 at the time of the foreclosure sales was less than the $403,000 amount credit-bid by AmericanWest for the purchase of the Trust Property. Therefore the indebtedness was reduced by an amount greater than the fair market value of the Property.

30.Based upon the foregoing, the deficiency balance owing to AmericanWest as of July 1, 2013 was $416,216.80.

31.As the prevailing party in the case AmericanWest is entitled to an award of reasonable attorneys' fees and costs in the case pursuant to the loan documents made between the parties. No timely objection was filed to the Affidavit of Attorneys' Fees

and Costs submitted by AmericanWest and the Court concludes pursuant to Rule 73 of the Utah Rules of Civil Procedure that the attorneys' fees and costs therein are reasonable given the claims, counterclaims, proceedings and trial in the case. Therefore, AmericanWest should be awarded $104,468.08 in attorneys' fees and $7,715.98 in costs.

32. The objections or motions for reconsideration filed by Defendant Robertson were denied for the reasons set forth in this Court's prior rulings.

ORDER AND JUDGMENT

Based upon the foregoing findings and conclusions, the Court orders, adjudges and decrees against Defendant Michael L. Robertson as follows:

1. Pursuant to AmericanWest's First and Second Claims for Relief, a money judgment is made in favor of AmericanWest against Defendant Robertson in the amount of $416,216.80 as of July 1, 2013;

2. Pursuant to AmericanWest's First and Second Claims for Relief, a money judgment is made in favor of AmericanWest against Defendant Robertson in the amount of $167.14 per diem (i.e., $290,513.97 in principal times 21% percent divided by 365 days) from July 1, 2013 through the entry of this Judgment pursuant to the terms of the default contract rate of interest set forth in loan documents made between the parties;

3. Pursuant to AmericanWest's Third Claim for Relief, a money judgment is made against Defendant Robertson for reasonable attorneys' fees in the amount of $104,468.08 and costs and expenses in the amount of $7,715.98;

4. This judgment shall accrue post-judgment interest at the default contract rate of

interest of twenty-one percent (21%) until paid based upon the loan documents made between the parties pursuant to *Utah Code Ann.* § 15-1-4;

5.This judgment shall be augmented by an award of reasonable attorneys' fees and costs incurred by AmericanWest in enforcing this Judgment pursuant to the terms of the loan documents made between the parties;

6.Pursuant to this Court's prior ruling on AmericanWest's motion for summary judgment, all counterclaims alleged against AmericanWest by Defendant Robertson are dismissed with prejudice; and

7.This Judgment is final as to the matters ruled upon and shall be entered by the clerk of court without unreasonable delay.

----------END OF DOCUMENT----------

1242270V7

APPELLEE'S ADDENDUM TAB C

FAR WEST BANK
A Division of American West Bank, Spokane, WA

ACH ORIGINATION AGREEMENT
BETWEEN FAR WEST BANK AND
Mike Robertson

This agreement is made this 14th day of October, 2008 between Mike Robertson (the "company") and Far West Bank, a financial company.

The company has requested that Far West Bank permit it to initiate electronic signals for paperless entry (entries) through Far West Bank to accounts maintained at Far West Bank and in other financial institutions, by means of the automated clearing house (the ACH) operated by Northwest Clearing House Association, (NWCHA).

ACH Credit Limit $75,000.00 ACH Debit Limit $75,000.00

☑ PPD ☐ CCD ☐ CTX ☐ WEB Account Number 201416807

Now, therefore, in consideration of mutual promises contained herein, it is agreed as follows:

1. The company will comply with the Northwest Clearing House Association rules and the laws of the United States presently in effect; however, they may change from time to time. The duties of the company set forth in the following paragraphs of this agreement in no way limits the requirement of complying with the rules or the laws. A copy of the rules may be obtained from Far West Bank upon request.

2. Far West Bank will transmit the credit and debit entries initiated by the company to the ACH as provided in the Rules and laws of this agreement.

3. The company will obtain from each of its customers an authorization to make one or more entries to the customer's account. The company will retain the original or a copy of such authorization for six (6) years after termination or revocation of such authorization.

4. The company will provide entry (entries) information on the mutually agreed upon medium and in the format specified by Far West Bank.

5. Each entry or file of entries shall be delivered to the location specified by Far West Bank in accordance with the time schedule set forth in Appendix A to this agreement.

6. The company will provide funds to cover any credit entry initiated by it as set forth in Appendix A to this agreement.

7. The company will receive funds for any debit entry it initiates on the day mutually agreed upon by the company and Far West Bank.

8. If the company discovers that any entry it has initiated was in error, it may notify Far West Bank of such error and Far West Bank will utilize its best efforts on behalf of the company, consistent with the rules, to correct the entry.

9. In the event any entries are rejected by the ACH for any reason whatsoever, it shall be the responsibility of the company to remake such entries; provided however, that Far West Bank shall remake such entries in any case where such rejection by the ACH was due to mishandling of such entries by Far West Bank and sufficient data is available to Far West Bank to permit it to remake such entries. The company shall retain and provide Far West Bank on request all information necessary to remake any file of entries for three days after midnight of the day the entries are made to the customer's account.

10. The company will provide funds to indemnify Far West Bank if any debit entry is rejected or if adjustment memorandum that relates to any such entry is received by Far West Bank.

11. With respect to any entries initiated by the company, the company will indemnify Far West Bank if Far West Bank incurs any loss or liability, except for losses solely attributable to Far West Bank's own negligence, resulting from:

(A) Entries supplied by the company to Far West Bank for processing to accounts maintained at Far West Bank, or

(B) The breach of any of the warranties of an originating financial institution contained in the rules.

12. The monthly charge for this service is $25 per month, and the charge for each ACH transaction initiated is $0.10. Additional charges may apply for returned items, NSF transactions and other pertinent transactions. The charges for these services may be subject to change at any time.

13. In the event the company incurs any loss due to mishandling of a particular entry or entries, Far West Bank's liability to the company shall be limited to:

(A) Losses resulting from its own negligence or.

(B) In the event Far West Bank is not negligent, the amount recoverable by Far West Bank from any third party pursuant to the rules or any indemnity agreement.

14. This agreement may be terminated on a ten days written notice by either party, provided that applicable portions of this agreement shall remain in effect with respect to any entries initiated by the company prior to such termination.

15. The company agrees to establish prudent security standards and policies that include proper safeguards to protect the confidentiality of all Login IDs and Passwords that are assigned to the company for initiating transactions using this system. Any transaction initiated or authorized using a valid combination of a Login ID and Password will be considered authentic, valid and binding by the company and Far West Bank. The Financial Institution agrees to provide reasonable assistance to establish Login IDs and Passwords, training, and support to the Company for properly using the services. If the Company suspects or believes any such information has been compromised, it shall immediately contact Far West Bank.

In witness whereof, the undersigned have duly executed the agreement by their duly authorized officers.

Mike Robertson "The Company"	Far West Bank
Signed Name	Signed Name
Mike Robertson	Ezra W. Wright
Printed Name	Printed Name
Owner	VP/E-Banking Manager
Title	Title
801-572-7674	(801) 818-3760
Contact Phone Number	Contact Phone Number

rev 05/07

ACH Agreement
Appendix A

1. The effective date in the file is the date that you want the money to be deposited to the accounts or debited from the accounts.

2. In order to ensure that the funds are transferred on the effective date, the e@ccess Cash Management file must be submitted to the bank before 3:00 pm, two (2) business days prior to the effective date.

3. The "Company" must have available funds in their account by 8:00 am on the effective date for the entries originated.

APPELLEE'S ADDENDUM TAB D

FAR WEST BANK
A Division of American West Bank, Spokane, WA

September 22, 2010

Mike Robertson
Instapolypay
444 W. Center
Provo, UT 84601

Dear Mr. Robertson:

I am writing to advise you that, in accordance with the terms of the ACH Agreement between Far West Bank and Instapolypay, Far West Bank is providing you notice of termination of ACH services. The decision has been made to not renew the existing ACH relationship.

The effective termination date is Wednesday, October 13th, 2010. Termination will take effect at the open of business on that day. (This assumes your receipt of this notice on Monday, September 27th. Please advise me if you receive this notice after that date).

Please note the minimum one business day settlement interval to which your ACH entries are subject, such that your final origination date is Friday, October 8th, and your final settlement date is Tuesday, October 12th.

If you have questions regarding this notice, please feel free to contact myself or Brian Guevara at 801-342-9712.

Regards,

Jeffrey Rounds, CTP
Vice President
Cash Management
Far West Bank
801-208-4078

APPELLEE'S ADDENDUM TAB E

FAR WEST BANK
A Division of American West Bank - Spokane, WA

October 12, 2010

Mike Robertson
Instapolypay
444 W. Center
Provo, UT 84601

Dear Mr. Robertson:

In reference to Far West Bank's letter dated September 22, 2010, (copy attached) Far West Bank has elected to extend the cancellation date to October 21st to allow the company additional time to make alternate ACH arrangements.

The effective termination date is **Thursday, October 21st, 2010.** Termination will take effect at the open of business on that day. (This assumes your receipt of this notice via USPS on Thursday, October 14th. Please advise me if you receive this notice after that date).

Please note the minimum one day settlement interval to which your ACH entries are subject, such that your *final origination date* is **Tuesday, October 19th**, and your *final settlement date* is **Wednesday, October 20th**.

If you have questions regarding this notice, please contact me.

Sincerely,

Jeffrey Rounds, CTP
Vice President
Cash Management
Far West Bank
801-208-4078

CC: Nicole Sherman, Jason Hester,

Encl: